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No. 95-220

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

THE PACIFIC LUMBER COMPANY; MAXXAM GROUP INC.; MAXXAM INC.; CHARLES HURWITZ; PAUL N. SCHWARTZ; JAMES IACO; WILLIAM LEONE,

Petitioners,

vs.

CLARENCE KAYES; GENE KENNEDY; SHARON KENNEDY; WILEY LACY; JOHN R. MAURER; LESTER REYNOLDS; SHIRLEY REYNOLDS; HOLLIS ROLLINS; DONALD FILBY; JACK MILLER; JAMES LOVELL; PAUL S. BRADY; WILFRED A. BLAIN; LLOYD S. TUCKER; DONALD J. SCHOENHOFER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondents-Plaintiffs restate the Third Question in the Petition as follows:

3. Did the Ninth Circuit correctly apply the functional test of fiduciary status under ERISA Section 3(21)(A), which this Court endorsed in *Mertens v. Hewitt Associates*, 508 U.S. ___, 113 S.Ct. 2063, 124 L.Ed. 2d 161 (1993), in upholding the district court's finding that Petitioners Hurwitz and Leone acted as fiduciaries in selecting an annuity provider upon plan termination?

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To the Honorable Supreme Court:

The Respondents, Clarence Kayes, et al., respectfully request that this Court deny the Petition for a Writ of Certiorari seeking review of the Ninth Circuit's decision in this case. That decision is reported at 51 F.3d 1449 (9th Cir. 1995) and is reprinted at pages 1-41 in Petitioners' Appendix.

STATEMENT OF THE CASE

Respondents incorporate the "Factual and Procedural Background" in the opinion below, *Kayes v. Pacific Lumber Company*, 51 F.3d 1449, 1453-54 (9th Cir. 1995). Because Petitioners ignore relevant facts – particularly the active roles Defendants Hurwitz and Leone played in the selection of Executive Life as the annuity provider for the retirees and participants of the Plan – Respondents will supplement the Court of Appeals' factual and procedural statement accordingly. In addition, because Petitioners include in their analysis of the First Question Presented an issue which neither the district court nor the Court of Appeals has ruled upon – whether Plaintiffs have standing to allege prohibited transaction claims under ERISA, as amended by PAPA – Respondents set forth the procedural history of the section 406 prohibited transaction claim, which involved Defendants' use of residual plan assets as collateral for a bridge loan. That history establishes that Petitioners have not timely raised the issue of Plaintiffs' standing. Rather, the only issue involving Defendants' use of residual plan assets which the parties litigated and which the lower courts decided involved the

single question of whether Defendants' collateralization of "excess" pension assets implicated "plan assets". *Kayes, supra,* at 1466-1468.

Plaintiff-Respondents' ("Plaintiffs" or "Respondents") ERISA action arose out of Defendant-Petitioners' 1986 termination of the Pacific Lumber Company Pension Plan ("Plan") and purchase of a group annuity contract from the now defunct Executive Life Insurance Company ("ELIC"). Defendant-Petitioners ("Defendants" or "Petitioners") had purchased ELIC's group annuity contract in order to provide the Plan's participants, beneficiaries, and retirees with the monthly retirement benefits they were entitled to receive under the provisions of the Plan. ER 100.[1] The Plan's termination followed petitioner Maxxam's successful takeover of the Pacific Lumber Company ("PL") – a hostile takeover financed in large part by ELIC's direct and indirect acquisition of almost 22% of the $450 million in "junk" bonds issued by Maxxam to finance its acquisition of PL. ER 100. Plaintiffs alleged that by selecting ELIC, Defendants had acted imprudently and out of self-interest in violation of ERISA § 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A) and (B). ER 113-115. Plaintiffs further alleged that Defendants had committed a breach of ERISA section 406 by pledging PL's anticipated receipt of the Plan's "excess" assets as

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[1] Throughout this Opposition, the following abbreviations are used: "ER" (Excerpts of Record filed with the Ninth Circuit); "CR" (Clerk's Record); "Pet. App." (Appendix attached to Defendants' Petition); "Resp. App." (Appendix attached hereto).

collateral for a "bridge loan" Maxxam obtained to facilitate its hostile purchase of PL. ER 117-120. The Court of Appeals held, *inter alia*, that Plaintiffs had standing to bring their section 404 claims based on the selection of ELIC (reversing the district court), that Defendants Hurwitz and Leone were fiduciaries under ERISA's functional definition (upholding the district court), and that Defendants' use of anticipated "excess" pension assets as collateral for a bridge loan supported Plaintiffs' claim that Defendants used Plan assets in a prohibited transaction (reversing district court).

A. Procedural Background Of Prohibited Transaction Claim.

On March 30, 1993, Defendants filed motions for summary judgment on the following grounds: (1) Plaintiffs lacked standing to sue for section 404 breaches of fiduciary duty because the Plan had been terminated; (2) Plaintiffs' section 406 prohibited transaction claims failed because Defendants had neither pledged, nor otherwise adversely affected, any assets of the Plan; and (3) Six of the seven Defendants were not fiduciaries of the Plan.

At a hearing on May 11, 1993, the district court granted summary judgment to Defendants on Plaintiffs' section 406 prohibited transaction claims on the exclusive ground that the challenged transactions did not involve plan assets. ER 1685-89. By order dated May 17, 1993, the district court granted summary judgment to Defendants on Plaintiffs' other claims, holding that Plaintiffs lacked standing to sue Defendants for section 404 breaches of fiduciary duty. ER 1644-49. Thus, the district court never

ruled on Plaintiffs' standing to allege prohibited transaction claims.

Nor did the Court of Appeals address the standing issue in the context of the prohibited transaction claims. Petitioners failed to raise that issue in a timely fashion. In all of their briefs to the Ninth Circuit, including the post-PAPA letter-brief of November 1, 1994 and their Petition For Rehearing (both of which addressed PAPA), Petitioners omitted mention of their current view that the statute denies standing to Respondents to allege prohibited transaction claims. Petitioners first raised this issue in their May 19, 1995 "Application to File Amendment to Petition for Rehearing". Resp. App. 14-24. Thus, Petitioners' self-styled "Amendment" constituted a new and untimely second petition for rehearing, and the Ninth Circuit denied Petitioners' leave to file their "Amendment" by order dated June 7, 1995. Resp. App. 29-30.

B. Facts Establishing The Fiduciary Status Of Hurwitz And Leone.

Effective March 31, 1986, PL terminated the Plan. Between March and October, 1986, a team of Maxxam and PL officers and employees obtained, and then evaluated, bids from life insurance companies to provide a group annuity contract. Although not on the list of insurers from which bids were to be solicited, ELIC was added to the list at Petitioner Hurwitz' insistence. ER 1314 - 1321; 1441.

Petitioner Leone headed the team of Maxxam and PL employees which implemented the annuity selection process. ER 1266; 1270; 1323 - 1325. Hurwitz also appointed

Petitioners Schwartz and Iaco to this team (*id.*), even though they were employees of Maxxam, not of PL. Petition at 6.[2]

In the course of the bidding process, PL's Vice President for Finance and Treasurer, Vincent Garner, wrote a memorandum to Leone, detailing problems with ELIC, including its large junk bond holdings, its role in Maxxam's takeover of PL, and its questionable reinsurance practices. ER 342 - 344. PL's own consultant, Conning & Co., had rated ELIC only "average," a lower rating than most of the other insurers under consideration. ER 105 - 106; 304, 311 - 316. Leone discussed Garner's memo with Hurwitz and wrote a rebuttal memo to Garner. ER 1272; 1366.

At an October 1, 1986 meeting in which both Leone and Hurwitz participated, Petitioners selected ELIC to provide the group annuity. ELIC's bid of $37.2 million was the lowest; Metropolitan Life's bid of $39.9 million was the next lowest, a difference of $2.7 million. ER 105:22-24; CR 387, p. 5, fn. 5. Hurwitz suggested that Metropolitan Life be contacted to see whether it would lower its final bid. ER 357 - 358; 381 - 382; 1289; 1333 - 1334. When Metropolitan Life refused, both Hurwitz and Leone voted to select ELIC. ER 1331.

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[2] Petitioners' contention that all of the individuals who participated in the selection of the ELIC annuity were acting as employees of PL and not as individual fiduciaries (Petition at 2-3; 25), does not square with their simultaneous admission that Schwartz and Iaco were employed by Maxxam. Petition at 6.

During the October 1st meeting, Hurwitz telephoned Garner to rebuke him for raising questions about ELIC. ER 295:12-25.

REASONS FOR DENYING THE WRIT

Petitioners fail to satisfy any of the criteria traditionally applied by the Court in determining whether to grant a Writ of Certiorari. First, Petitioners point to no current, real or intolerable conflict among the circuits regarding any Question Presented by their Petition.

Second, in a successful effort to discourage the type of plan termination which is the subject of the instant action, Congress has imposed a series of excise taxes (currently potentially 50%) on reversions to corporate sponsors of "surplus" assets. Thus,

> The reversions that now occur mostly arise in connection with the dissolution of the plan sponsor. The type of transaction that drove the 1980s boom in asset reversion, that is, terminating the plan of a continuing firm in order to capture the reversion, *has largely ceased.* (Emphasis added.)

John H. Langbein and Bruce A. Wolk, *Pension and Employee Benefit Law,* Foundation Press (2nd ed. 1995)[3]

[3] A ten percent nondeductible excise tax on asset reversions received from a qualified plan after December 31, 1985 was enacted as part of the Tax Reform Act of 1986. IRC § 4980. In 1988, the 10 percent tax on reversions was temporarily raised to 15 percent. Technical and Miscellaneous Revenue Act (TAMRA)

Third, no compelling reason exists for this Court to review Petitioners' arguments regarding both the standing of Plaintiffs to sue for ERISA section 406 prohibited transactions and the remedies available for Defendants' alleged breaches of sections 404 and 406 – issues not decided by the lower courts.

Fourth, the Court of Appeals properly decided that the pension assets Defendants pledged as security for their bridge loan were "plan assets" under ERISA's prohibited transaction rules. In so holding, the Court of Appeals decided a question of first impression which does not warrant review by this Court.

Finally, the roles played by Defendants Hurwitz and Leone in selecting the ill-fated ELIC annuity – facts which Petitioners simply ignore – establish that the lower courts properly applied ERISA's functional test of fiduciary status. Both of these Defendants were, indeed, ERISA fiduciaries of the Plan.

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of 1988, §§ 5072 and 6069, amending IRC §§ 4980(a)and (c). The Omnibus Budget Reconciliation Act of 1990 (OBRA 1990) amended IRC § 4980(a) to increase the tax on reversions from 15% to 20%. OBRA 1990 also added new IRC § 4980(d), further increasing the tax on employer reversions to 50% unless the employer either (A) established a "qualified replacement plan," or (B) increased benefits under the terminating plan *pro rata* for each participant by a minimum of 20% of the expected reversion. *See* Yale D. Tauber & William A. Bader, *Surplus Pension Assets: History and Opportunity*, 18 J. Pension Planning & Compliance 19 (1992).

A. Neither Respondents' Standing To Allege Claims For Prohibited Transactions Nor The Scope Of Remedies Available To Respondents Was Argued Or Decided In The Courts Below; There Is No Compelling Reason For This Court To Address Either Issue.

Reversing the district court, the Ninth Circuit held that Plaintiffs have standing under Section 502(a) of ERISA to pursue their claims that Defendants violated ERISA § 404(a) in selecting Executive Life as the annuity provider upon termination of the Plan. *Kayes*, 51 F.3d at 1454-55. Petitioners now concede that Respondents have standing to assert such claims for breach of fiduciary duty (Petition at 15), but argue that this Court should grant *certiorari* in order to hold that Respondents do not have standing to assert a prohibited transaction claim arising out of the bridge loan. (Id. at 16.) Petitioners also seem to contend that the Ninth Circuit has impermissibly expanded the remedies available to Plaintiffs. (Id. at 17.)

However, as indicated in the procedural history set forth above (*supra*, pp. 3-4), the district court did not hold that Plaintiffs lacked standing to assert their prohibited transaction claim under ERISA Section 406, nor did Defendants raise that issue on appeal to the Ninth Circuit. Accordingly, the Ninth Circuit did not decide the question. "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970); *United States v. Mendenhall*, 446 U.S. 544, 551-552 n. 5 (1980). No "unusual circumstances" warrant the grant of *certiorari* on the issue of Plaintiffs' standing under Section 406. *See Berkemer v. McCarty*, 468 U.S. 420, 443, n. 38 (1984).

Moreover, the courts below would not have broken new ground nor created a conflict with other circuits had they in fact reached this standing question. Even before PAPA added section 502(a)(9) to ERISA, participants of terminated pension plans had standing to seek a constructive trust remedy for violations of ERISA's fiduciary duty provisions, including prohibited transactions. *See Amalgamated Clothing & Textile Workers v. Murdock*, 861 F.2d 1406, 1416-19 (9th Cir. 1988); *Waller v. Blue Cross of California*, 32 F.3d 1337, 1339-40 (9th Cir. 1994). No significant split in authority exists on this standing issue. *See Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1221-22 (5th Cir. 1992) (following *Murdock*). In *Teagardner v. Republic-Franklin, Inc. Pension Plan*, 909 F.2d 947 (6th Cir. 1990), *cert. denied*, 498 U.S. 1027, 111 S.Ct. 678, 112 L.Ed. 2d 670 (1991), cited by Petitioners, the Sixth Circuit merely distinguished *Murdock* as limited to situations involving misuse of plan assets. 909 F.2d at 953. Plaintiffs' prohibited transaction claim involves just such a situation. In addition, the Sixth Circuit has criticized its *Teagardner* decision and has broadened its analysis of standing under ERISA. *Swinney v. General Motors Corp.*, 46 F.3d 512, 518 (6th Cir. 1995).

PAPA did not narrow participants' standing under Section 502(a). Thus, PAPA states that "[n]othing in this Act shall be construed to limit the legal standing of individuals to bring a civil action as participants or beneficiaries under section 502(a)" of ERISA. Resp. App. 7. As Representative Pat Williams, who introduced PAPA onto

the floor of the House (see 140 Cong. Rec. H 10621-02), stated:

> S.1312 does not represent a change from current law, but rather a clarification made necessary because of recent court decisions. The courts have wrongly held that annuitants are not plan participants and therefore lack standing under ERISA to challenge the decision of the plan fiduciary to dispose of plan assets by purchasing annuities.
>
> Because S.1312 is designed to overturn this line of specific court cases, no limiting inference should be drawn with respect to standing questions for annuitants under any other section of any title of ERISA. To the contrary, other standing issues should be guided by the broad remedial policy reflected in today's legislative clarification, not by the incorrect court holdings that we reject today.

140 Cong. Rec. H 10621 (October 3, 1994).

Petitioners also contend that the Ninth Circuit's opinion permits Plaintiffs to pursue remedies beyond those available under ERISA.[4] They do not specify, however, exactly what remedies they contend the Court of Appeals

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[4] Petitioners appear to confuse the scope of remedies permitted under section 502(a)(9) with the issue of standing, arguing that *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed. 2d 96 (1985) and *Mertens v. Hewitt Associates*, 508 U.S. ___, 113 S.Ct. 2156, 104 L.Ed. 2d 161 (1993) "require ERISA's standing provisions to be strictly construed." Petition at 13. However, the word "standing" does not appear in either *Russell* or *Mertens* – both decisions concern the remedies available under ERISA, not standing.

has erroneously authorized. Nor can they do so at this procedural juncture of the litigation. Following trial, if Plaintiffs are successful, the district court will impose such remedies as it deems "appropriate relief." At that point – not beginning in the Supreme Court, Petitioners could seek a review of any such remedies as may have been awarded to Plaintiffs.

Nevertheless, Petitioners argue that the Ninth Circuit's reversal of Plaintiffs' prohibited transaction claim regarding the bridge loan included a decision on the issue of available remedies. That argument is specious. As demonstrated above (*supra*, pp. 3-4), the only prohibited transaction issue Petitioners presented to the Ninth Circuit involved the question of whether or not they pledged a "plan asset" in agreeing to the bridge loan.

Finally, Petitioners imply that the Ninth Circuit impermissibly extended the remedies available to Plaintiffs on their claims that Petitioners breached fiduciary duties in selecting Executive Life. (Petition at 17.) The Ninth Circuit, however, did not address the issue of remedies for those breaches – it merely reversed in part and remanded a grant of summary judgment in favor of Petitioners with regard to Plaintiffs' standing to pursue those breach of fiduciary duty claims under Section 502(a) (now conceded by Defendants to be allowed by PAPA). The Ninth Circuit did not award summary judgment to Plaintiffs, let alone order remedies. Petitioners do not point to any remedies sought by Respondents for

these breaches of fiduciary duty which Petitioners contend are beyond the scope of those allowed by ERISA.[5]

There is simply no reason for the Court to grant *certiorari* in order to address amorphous issues which were not decided by the courts below.

B. In Deciding A Question Of First Impression, The Ninth Circuit Properly Found That The Pension Assets Pledged As Collateral For The Bridge Loan Were "Assets Of The Plan" Under ERISA's Prohibited Transaction Rules.

As noted by the Ninth Circuit, the quesiton of "whether a contingent right to receive plan surplus following distribution constitutes a plan asset" is a question of first impression which has not been addressed by any other circuit. *Kayes*, 51 F.3d at 1466 and fn. 14. Therefore no conflict among the circuits exists. Moreover, this question arises under now unusual circumstances which are unlikely to recur: PL pledged its right to receive residual Plan assets as collateral for a bridge loan used to refinance the PL takeover before the Plan distributed assets or purchased a replacement group annuity. This pledge effectively required Petitioners to obtain a reversion of

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[5] In any event, section 502(a)(9) authorizes Respondents to obtain "appropriate relief", thus making available a broad range of remedies. *Compare, Mertens v. Hewitt Associates, supra* (narrow scope of remedies available under Section 502(a)(3), which authorizes "appropriate *equitable* relief" only. PAPA was introduced and enacted just after *Mertens*.

Plan assets of not less than $50 million. It is unlikely that a review based on these facts will have any significant impact beyond this case.[6]

This Court has adopted a broad definition of "plan assets" with regard to ERISA fiduciary issues. *John Hancock Ins. Co. v. Harris Trust & Savings Bank*, 114 S.Ct. 517, 126 L.Ed.2d 524 (1993) ("free funds" under group annuity contract do not qualify for guaranteed policy exception to "assets of such plan" under ERISA 401(b)(2)). Nevertheless, Petitioners urge that the term "assets of the plan" be construed narrowly under ERISA section 406. Petition at 19-21. The Ninth Circuit correctly found that the expected residual pension assets pledged as collateral were "assets of the plan" under section 406:

> In light of the legislative history revealing a policy against self-dealing in plan termination and this court's policy of interpreting the fiduciary duty broadly, we hold that the collateral for the bridge loan was a plan asset. Corporations should not be permitted to rely on their ERISA

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[6] The 1986 excise tax was meant to discourage terminations for reversion. (*See, supra,* at pp. 6-7 n.3.) The before-and-after data imply that the measure was quite successful. For the two years 1985-86, 848 such terminations affecting 956 thousand particpants occurred, yielding reversions in excess of $10.9 billion. By contrast, in 1988 after the excise tax was in effect, there were seven such reversions affecting three thousand participants and amounting to $36.8 million. *See* Employee Benefit Research Institute, Questions and Answers about Employee Benefits, EBRI Issue Brief 10 (Table 12) (May 1988).

> plan assets to finance takeovers or other risk ventures.

Kayes, 51 F.3d at 1468.

Petitioners assert that the pledge of Plan assets as collateral should not be a prohibited transaction because it "did not jeopardize assets of the Plan, or affect [Respondents'] vested benefits". Petition at 20. However, "the question of whether [a prohibited transaction rule of] ERISA has been violated does not depend on whether harm results from the transaction. Congress was concerned in ERISA to prevent transactions which offered a high potential for loss of plan assets or for insider abuse. . . . " *Marshall v. Kelly*, 465 F.Supp. 341, 354 (W.D.Okla. 1978). *See also, Commissioner v. Keystone Consol. Indus.*, 508 U.S. ___, 113 S.Ct. 2006, 2012, 124 L.Ed. 2d 71 (1993) ("Congress' goal was to bar categorically a transaction that was likely to injure the pension plan.").

Here, the Plan's liabilities had not been satisfied and no Plan assets had been distributed at the time of the bridge loan. Petitioners did not select ELIC as the group annuity provider until three months after Maxxam pledged its expected reversion of Plan assets as collateral. ER 1061. Thus, Maxxam became obligated to obtain a reversion of at least $50 million from the Plan – $25 million as collateral for the bridge loan and $25 million to remain in PL – *or* to use its own funds to meet their obligations, *or* to obtain more expensive financing. Obviously, such a pledge gave rise to a high potential to sacrifice retiree security in order to maximize the reversion.

Petitioners cite authority from bankruptcy and property law in support of their argument that the residual Plan assets pledged as collateral were not "assets of the Plan." Petition at fn. 14 and 20. Regardless of whether these cases are correct for the purpose of determining which of a sponsoring employer's creditors has the right to residual assets when received, these cases are not relevant for the purpose of determining whether the pledge of such assets constitutes a prohibited transaction within the meaning of ERISA section 406. Therefore, the Ninth Circuit rejected Petitioners' restrictive definition of "assets of the plan", and held that this term "is not defined in strictly financial terms, but rather is determined by examining whether the 'item in question may be used to the benefit (financial or otherwise) of the fiduciary at the expense of plan participants or beneficiaries'." *Kayes*, 51 F.3d at 1467 (citing *Acosta v. Pacific Enterprises*, 950 F.2d 611, 620 (9th Cir. 1991).) Respondents entirely ignore the facts regarding their pre-termination pledge of plan assets because those facts were pregnant with the potential for abuse and risk.[7]

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[7] Prior to the selection of an annuity provider, in July 1986, Maxxam received a bridge loan from a consortium of banks led by Irving Trust to refinance $100 million in debt from the PL buyout. ER 1178. To obtain this bridge loan, Maxxam pledged as collateral $25 million in Plan assets it expected to receive as a reversion following Plan termination. ER 107. By agreement dated July 10, 1986, Maxxam executed a "Pension Pledge and Security Agreement" with Irving Trust, pledging the "surplus" Plan assets, less $25 million, as collateral for the bridge loan. ER 1232, 1061. (Other agreements had already obligated Maxxam to leave at least $25 million of the surplus Plan assets with PLC. ER 1256.) The Pension Pledge Agreement included a covenant that

The Ninth Circuit's holding also is in accord with statutory provisions and Supreme Court precedent regarding the reversion of surplus plan assets after plan termination. ERISA section 4044(d) provides that upon termination,"residual assets" may be distributed to the employer only *after* all liabilities of the plan to participants and their beneficiaries have been satisfied. *See, Mead Corp. v. Tilley*, 490 U.S. 714, 718, 109 S.Ct. 2156, 2160, 104 L.Ed.2d 796 (1989) ("If funds remain *after* 'all liabilities of the plan to participants and their beneficiaries have been satisfied,' they may be recouped by the employer.") (emphasis added); *Fuller v. FMC Corp.*, 4 F.3d 255, 263 (4th Cir. 1993) ("to fulfill the duties imposed by [ERISA section 4044], the administrator must pay all liabilities before concluding that excess assets exist which may be returned to the employer.") Thus, at the time of the bridge loan, the $25 million in Plan funds Petitioners pledged as collateral were Plan assets because the Plan had not yet satisfied its liabilities to participants and beneficiaries through the purchase of a group annuity.

C. The Ninth Circuit Properly Upheld The District Court's Determination That Defendants Hurwitz And Leone Were ERISA Fiduciaries Under The Functional Test.

In an attempt to manufacture a split among the circuits, Petitioners mischaracterize the Ninth Circuit's

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Maxxam "shall use its best efforts and will take (or cause to be taken) all such other action as may be necessary or desirable, or which may be reasonably requested by Irving to procure the Excess Pension Assets." ER 1235-36.

analysis in affirming the fiduciary status of Petitioners Hurwitz and Leone. Following this Court's holding in *Mertens*, the Ninth Circuit applied the functional test of fiduciary status:

> The Supreme Court has held that ERISA "defines 'fiduciary' not in terms of formal trusteeship, but in *functional* terms of control and authority over the plan, thus expanding the universe of persons subject to fiduciary duties and to damages under Section 409(a)."

Kayes, 51 F.3d at 1459, quoting *Mertens*, 113 S.Ct. at 2071. The Ninth Circuit rejected Petitioners' argument that there should be an exception to the functional test – an exception shielding from fiduciary responsibility any corporate officer who exercises control and authority over a plan on behalf of a named fiduciary corporation. *Id.* at 1459-61.[8]

Petitioners distort the Ninth Circuit's holding in *Kayes* by falsely characterizing it to mean that "all officers

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[8] Petitioners erroneously assert that the Fifth and Seventh Circuits have narrowly interpreted the definition of a fiduciary under ERISA Section 3(21)(A). Petition at 23. The Seventh Circuit has stated that it has "consistently" given a "broad reading" to the ERISA definition of fiduciary. *Mutual Life Ins. Co. of New York v. Yampol*, 840 F.2d 421, 425 (7th Cir. 1988). The Fifth Circuit has given "the term fiduciary a liberal construction in keeping with the remedial purpose of ERISA." *American Fed. of Unions Local 102 Health & Welfare Fund v. Equitable Life Assur. Soc.*, 841 F.2d 658, 662 (5th Cir. 1988). In fact, "[i]t is universally recognized that the definition of fiduciary in section 3(21) is broad and should be broadly construed." Stanley, "The Definition of a Fiduciary Under ERISA: Basic Principles", 27 *Real Prop., Prob. and Trust J.*, 240 (Summer, 1992).

and directors of a corporate named fiduciary slip into the named fiduciary's shoes and become individual ERISA fiduciaries, regardless of the role that the person may have played in the decision of the plan fiduciary." Petition at 24. In fact, the Ninth Circuit merely reaffirmed that the functional test of fiduciary status applies to all persons, including corporate officers and directors.

Petitioners also overstate the Third Circuit's holding in *Confer v. Custom Engineering*, 952 F.2d 34 (3d Cir. 1992) in order to create the impression of a conflict between the Third and Ninth Circuits. In *Confer*, the Third Circuit held that corporate officers were not fiduciaries of an ERISA plan " . . . *solely by reason of holding office.*" *Id.* at 37; emphasis added. The *Confer* majority endorsed Judge Seitz's concurrence in holding that "officers of a corporation 'may assume fiduciary status even absent a designation as the named fiduciary or trustee of the plan, *by performing functions that fulfill the statutory definition of a fiduciary.*' " *Id.* 37, fn. 3, quoting from concurrence, *Id.* at 39; emphasis added. As Judge Seitz explained, the individual Defendants in *Confer* had not exercised any fiduciary discretion in executing a plan amendment for the plan sponsor, and the complaint contained no allegations that "would support a finding that [the sponsor's officers] assumed fiduciary status." *Id.* at 40.[9]

In short, *Confer* does not hold that ERISA's functional test of fiduciary status can be evaded by the simple

---

[9] The Ninth Circuit panel accepted Petitioners' reading of the Third Circuit's holding in *Confer* and therefore also overstated the differences between the two circuits. *Kayes*, 51 F.3d at 1459.

expedient of naming a corporate fiduciary in the plan instrument. *Confer*, in fact, supports the functional test of fiduciary status articulated in the Ninth Circuit's opinion and endorsed by this Court in *Mertens*. No real conflict exists between the Ninth and Third Circuits.[10]

Previously, Petitioners have not disputed that Hurwitz and Leone were plan fiduciaries under the functional test. *See, e.g., Kayes*, 51 F.3d at 1459 ("PL does not claim under this functional test that Hurwitz and Leone are not fiduciaries."). Now, however, Petitioners assert that the record contains no evidence that Hurwitz or Leone engaged in conduct that could have made them fiduciaries as a matter of fact or law. Petition at 26-27.

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[10] All post-*Confer* decisions which cite that case limit its holding as described in Judge Seitz's concurrence. *See, Tybout v. Karr Barth Pension Admin., Inc.*, 819 F. Supp. 371, 377 (D.Del. 1993) (citing Judge Seitz's concurrence); *Robco of America, Inc. v. Insurance Company of North America, et al.*, 845 F. Supp. 1112, 1116 (W.D.Pa. 1994) (" . . . Diversified's role in administering the Plan did not give rise to the level of discretionary control requisite to render it a fiduciary under Sec. 1109," citing *Confer*); *Professional Helicopter Pilots Association v. Denison*, 804 F. Supp. 1447, 1451 (M.D. Ala. 1992) (corporate status does not by itself render a corporate officer an ERISA plan fiduciary (citing *Confer*), but " . . . a person may be considered a fiduciary of a plan if he exercises individual discretionary authority over the plan and its assets"); *McLaughlin v. Compton*, 834 F. Supp. 743, 751, fn. 6 (E.D. Pa. 1993), *aff'd in relevant part and rev'd in other part, sub nom. Reich v. Compton*, 57 F.3d 270, 279 fn. 13 (3d Cir. 1995) (citing with approval *Confer*'s reference (at p. 37 n. 4) to *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1220 (2d Cir. 1989) which held that where a corporation is a fiduciary, misuse of corporate form can lead to a finding of individual fiduciary liability on part of corporations's officers or to piercing the corporate veil.)

Petitioners have conveniently forgotten Hurwitz' and Leone's conduct which led to the imprudent selection of ELIC as the Plan's annuity provider. The facts set forth in Respondents' Statement of the Case give sufficient detail to show that Hurwitz and Leone acted as fiduciaries. For example, Hurwitz and Leone rebuked PL's Vice-President of Finance, Vincent Garner, for raising questions about ELIC during the annuity selection process. Mr. Garner had warned Leone about ELIC's junk bond portfolio and suspect reinsurance practices – the very problems which led to ELIC's bankruptcy. Thus, there is no reason why this Court should reexamine the evidentiary record which led both the district court and the Ninth Circuit to conclude that Hurwitz and Leone acted as fiduciaries in selecting ELIC as the Plan's annuity provider.

CONCLUSION

For all of the foregoing reasons, Respondents pray that the petition for writ of certiorari be denied.

Dated: September 6, 1995

Respectfully submitted,

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October 26, 1994

(Filed Oct. 27, 1994)

BY OVERNIGHT DELIVERY

Clerk
U.S. Court Of Appeals
For The Ninth Circuit
U.S. Court Of Appeals & Post Office Building
121 Spear Street
P.O. Box 193939
San Francisco, CA 94119-3939

Re: ***Milier, et al. v. Pacific Lumber Co., et al.***
Nos. 93-16271/93-16575

Dear Clerk:

Please advise the Court that on October 22, 1994, the President signed into law the Pension Annuitants Protection Act of 1994 ("PAPA") which renders moot the district court's Order of May 17, 1993 and Final Judgment of May 25, 1993 dismissing plaintiffs' complaint on the grounds that they lacked standing under ERISA §§ 502 and 409.

PAPA requires that the district court's standing order be vacated; none of the remaining issues on appeal arise from final, non-appealable orders. Therefore, the Court

should vacate the district court's standing order and remand with instructions that the provisions of PAPA be applied.

The Annuitant's Protection Act of 1994 (attached hereto as Exhibit A) amends ERISA § 502(a), 29 U.S.C. § 1132(a), to clarify that participants and beneficiaries of a terminated plan have standing to bring a civil action "in the event that the purchase of an insurance contract or insurance annuity in connection with the termination of an individual's status as a participant covered under a pension plan" constitutes a violation of ERISA's fiduciary responsibility provisions or the plan. Such action may seek "to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts." This amendment applies to any legal proceeding pending or brought on or after May 31, 1993.

Thus, the PAPA amendment of ERISA resolves in plaintiffs' favor the standing issue raised in the instant appeals and briefed extensively by all parties and *amici*. *See* Appellants' Opening Brief, pp. 9 - 17; Appellees' Answering/Opening Brief, pp. 10 - 18; Appellants' Reply Brief, pp. 1 - 5; Appellees' Reply Brief, pp. 1 - 9; Secretary of Labor's Brief As *Amicus Curiae*, pp. 9 - 19; American Association of Retired Persons' Brief as *Amicus Curiae*, pp. 4 - 10.

Because of the enactment into law of PAPA, the district court's standing order must be vacated. (*See, Lewis v. Continental Bank Corp.*, 110 S.Ct. 1249 (1990) (lower court's

order vacated, where, after court of appeals decision, Congress amended the federal banking law to make clear that state officials had the power they claimed to exercise); *In re Bunker Ltd Partnership*, 820 F.2d 308 (9th Cir. 1987) (where amended statute gave agency right to administrative warrant, dispute over agency's ability to obtain warrant under original statute rendered moot.)

Moreover, the district court's dismissal for lack of standing was the only final, appealable order before the Court of Appeals. The other orders appealed by plaintiffs were interlocutory and not appealable absent the district court's Order and Judgment dismissing for lack of standing.[1] Similarly, the issues presented by defendants' cross-appeal were all interlocutory in nature and not appealable absent plaintiffs' appeal of their dismissal for lack of standing.[2] Therefore, the Court of Appeals no longer has

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[1] By Order dated April 14, 1993, the district court denied plaintiffs' motion for class certification, and held that plaintiffs' action could only proceed derivatively on behalf of the Plan. In its April 14, 1993 Order, the district court also dismissed named plaintiffs Kayes, G. Kennedy, Lacy, Maurer, and L. Reynolds as "inadequate" representatives of the Plan. In addition, the Order of April 14, 1993 required plaintiffs' counsel to completely withdraw from further legal representation of an organization the [sic] called "PL Rescue Fund." By Order dated May 17, 1993, the district court granted summary judgment for defendants on plaintiffs' prohibited transaction claims. Finally, by Order dated August 26, 1992, the district court denied plaintiffs' motion for an award of interim attorneys' fees pursuant to ERISA § 502(g).

[2] The defendants cross-appealed the district court's orders holding that the McCarran-Ferguson Act does not preclude the construction of ERISA's fiduciary provisions so as to impose liability upon a plan fiduciary for the selection of a state-licensed insurance company as a plan termination annuity pro-

jurisdiction regarding the remaining issues on appeal. (*See, United States v. Stanley,* 107 S.Ct. 3054 (1987) (no pendent appellate jurisdiction exits to review orders other than those certified under 28 U.S.C.A. 1292(b).)

Accordingly, plaintiffs respectfully request that the district court's standing order be vacated and that this action be remanded with appropriate instructions. Plaintiffs' respectfully submit herewith a proposed order for the Court's consideration.

Yours truly,

SIGMAN & LEWIS

By /s/ Alfred H. Sigman
Alfred H. Sigman

Attorneys for
Plaintiffs/Appellants

Enclosures: Five copies of letter
and [Proposed] Order

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vider, finding that defendants Hurwitz and Leone were Plan fiduciaries under ERISA, and denying partial summary judgment for defendants Hurwitz, Leone, Schwartz, and Iaco on the grounds that defendant Pacific Lumber Company, as the Plan's named fiduciary, had made the decision to select the Executive Life Insurance Company as the annuity provider for the terminated Plan.

103D CONGRESS
1ST SESSION

S. 1312

To amend the Employee Retirement Income Security Act of 1974 in order to provide for the availability of remedies for certain former pension plan participants and beneficiaries.

IN THE SENATE OF THE UNITED STATES

JULY 29 (legislative day, JUNE 30), 1993

Mr. METZENBAUM (for himself and MRS. KASSEBAUM) introduced the following bill; which was read twice and referred to the Committee on Labor and Human Resources.

A BILL

To amend the Employee Retirement Income Security Act of 1974 in order to provide for the availability of remedies for certain former pension plan participants and beneficiaries.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Pension Annuitants Protection Act of 1993".

SEC. 2. CIVIL ENFORCEMENT OF ERISA.

Section 502(a) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1132(a)) is amended –

(1) by striking the semicolon at the end of paragraph (5),

(2) by striking the period at the end of paragraph (6) and inserting "; or", and

(3) by adding at the end of the following new paragraph:

"(7)(A) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.".

SEC. 3. WAIVER OR REDUCTION OF CIVIL PENALTY.

Section 502(1)(3)(B) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1132(1)(3)(B)) is amended by inserting "(or to provide the relief ordered

pursuant to subsection (a)(7))" after "to restore all losses to the plan".

SEC. 4. EFFECT ON OTHER PROVISIONS.

Nothing in this Act shall be construed to limit the legal standing of individuals to bring a civil action as participants or beneficiaries under section 502(a) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1132(a)), and nothing in this Act, other than the relief authorized in section 2 of this Act, shall affect the responsibilities, obligations, or duties imposed upon fiduciaries by title I of the Employee Retirement Income Security Act of 1974.

SEC. 5. EFFECTIVE DATE.

The amendments made by this Act shall apply to any legal proceeding pending, or brought, on or after May 31, 1993.

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November 1, 1994

VIA HAND DELIVERY

Clerk, Ninth Circuit Court of Appeals
2 Rincon Center
P.O. Box 193846
San Francisco, California 94119

Re: *Miller, et al. v. Pacific Lumber Co. et al.*, Nos. 93-16271 & 93-16575.

To the Clerk of the Ninth Circuit Court of Appeals:

Respondents/cross-appellants in the above-captioned appeal hereby respond to appellants' October 26, 1994 letter informing the Court of the recent enactment of the Pension Annuitants Protection Act of 1994 ("PAPA"). For the reasons set forth below, appellants' argument that PAPA moots this appeal is incorrect. Nothing in PAPA

eliminates the case or controversy in this appeal or prevents this Court from finally deciding the issues properly before it on appeal and cross-appeal.

PAPA has not rendered either this appeal and cross-appeal or the district court's order moot. "A case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). A court will find that a change in the law will cause a case to become moot if, as a result of the change, the appellant no longer has a "specific, live grievance." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 479 (1990) (change in federal law rendered constitutional challenge to state laws moot). For example, a change in the law will render a case moot where the statute or the challenged provisions are repealed or amended to eliminate the live controversy during the pendency of the case. *See, e.g., Train v. City of New York*, 420 U.S. 35 (1975); *United States v. New Jersey State Lottery Commission*, 420 U.S. 371 (1975); *Kremens v. Bartley*, 431 U.S. 119 (1977).

The facts of this case simply fail to comport with those required for mootness. Neither party has challenged the applicability of 29 U.S.C. Section 1132(a), on constitutional grounds or otherwise. The issue, in the District Court and now on appeal, is not whether Section 1132(a) applies but how. Nor has the passage of PAPA eliminated any "specific live grievance" of appellants. At most, PAPA may affect the *result* of the appellate court's decision; it does not eliminate the controversy.

Appellants' allegation that the enactment of PAPA divests this Court of jurisdiction over the appeal and

cross-appeal also is incorrect. The Court may decide cross-appeals from an earlier order denying a summary judgment motion when reviewing a direct appeal of a final order that was favorable to the cross-appellants. *Hilton v. Mumaw*, 522 F.2d 588, 603 (9th Cir. 1975), *citing Peoria and Pekin Union Ry. v. United States*, 263 U.S. 528, 535-36 (1924), ("an otherwise nonfinal order may become cross-appealable upon the entry of a final order" when there is a risk that the cross-appellants might become aggrieved upon denial of the direct appeal). Appellants' reliance upon *United States v. Stanley*, 107 S.Ct. 3054 (1987), is misplaced. *Stanley* is limited to appeals from interlocutory orders certified pursuant to 28 U.S.C.A. 1292(b). This case involves the appeal of a final order and, therefore, the limitations on cross-appeals set forth in *Stanley* do not apply.

Furthermore, applying PAPA retroactively to the appeal and cross-appeal raises due process and equal protection concerns. Congress may amend a statute to allow for retroactive application provided that the amendment and its retroactive provisions are rationally related to a legitimate government end. *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1573 (9th Cir. 1993). In this case, an action on behalf of private plaintiffs is not the "only means available" to redress the alleged fiduciary breaches. Appellees' Reply Brief at 8. The Secretary has the power to bring an enforcement action and, in fact, has an enforcement action pending. *Id.* Applying PAPA retroactively to permit private plaintiffs to have standing to sue, therefore, does not further any government interest not already provided for, nor is it rationally related to the

legitimate goal of enforcing ERISA. In fact, as the legislative history of PAPA makes clear, the statute was explicitly aimed at changing the result in this case to allow private plaintiffs standing on the theory that their standing was necessary to enforce ERISA, notwithstanding the pendency of the Secretary's identical action.

Finally, the enactment of PAPA does not, as appellants argue, require this Court to defer to the District Court by dismissing the appeal without ruling on any aspects thereof. This Court has several options available that would not involve the inefficient use of judicial resources suggested by appellants.[1] Because this court properly has jurisdiction and has already developed the necessary record, it may finally decide all of the issues on appeal, recognizing the enactment of PAPA, or it may reopen the record for the limited purpose of allowing parties an opportunity to submit additional briefs regarding the impact of PAPA.

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[1] While appellants' letter may have been the proper procedure for drawing new authority to the Court's attention under Fed.R.App.P. Rule 28j, it was clearly not the proper procedure in any event for arguing that enactment of PAPA requires the District Court to reconsider its decision prior to action by the appellate court. Once on appeal, the proper procedure would have been to ask the District Court whether it wished to entertain a motion for relief from judgment pursuant to Fed.R.Civ.P. 60(b) and then to move this Court, if the District Court so indicated, for a remand. *Gould v. Mut. Life, Ins. Co. of New York*, 790 F.2d 769, 772 (9th Cir. 1986). Not having pursued this option in the District Court, appellants now must leave resolution of their appeal and respondents' cross-appeal to this Court.

For the reasons set forth above, respondents/cross-appellants respectfully request that the Court deny appellants request and proceed to issue its final opinion, or in the alternative order additional briefing on the effect of PAPA and then proceed to issue its final opinion.

Respectfully submitted,

/s/ Kathleen V. Fisher
Kathleen V. Fisher

cc: Alfred Sigman
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLARENCE KAYES, et al., Plaintiffs/Appellants/ Cross-Appellees, vs. PACIFIC LUMBER COMPANY, et al., Defendants/Appellees/ Cross-Appellants.	No. 93-16271, 93-16575 [Appeal from Judgment of the United States District Court for the Northern District of California, DC No. C-89-3500 (SBA)] **APPLICATION TO FILE AMENDMENT TO PETITION FOR REHEARING; DECLARATION OF KATHLEEN V. FISHER; EXHIBIT**

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I. INTRODUCTION

Defendants/Appellees/Cross-Appellants ("Applicants") seek leave to file an amendment to their Petition for Rehearing to raise a recently discovered issue of subject matter jurisdiction and statutory interpretation overlooked both by undersigned counsel in the Petition for Rehearing previously filed and by this Court in its Opinion: Does section 502(a)(9) of the Employee Retirement Income Security Act of 1974 ("ERISA") (amended October 22, 1994, after briefing and argument in this appeal), 29 U.S.C. § 1132(a)(9) provide former participants or beneficiaries of terminated pension plans standing (1) to seek any relief other than that necessary to assure receipt of amounts to be provided by an insurance contract or annuity purchased in connection with the termination of their participant/beneficiary status; or (2) to bring a claim asserting any cause of action other than one alleging that the purchase of the insurance contract/annuity constituted a breach of fiduciary duty.

In its Opinion the panel determined that section 502(a)(9) gives former participants or beneficiaries standing "to assure receipt by the participant or beneficiary of the amounts provided or to be provided" by an insurance contract or insurance annuity purchased after the termination of a pension plan. This standing, however, does not give rise to all of the causes of action brought, or all of the remedies sought, by plaintiffs/appellants/cross-appellees ("Plaintiffs") herein. For example, Plaintiffs' claims under sections 406(a) or (b) arising from any prohibited transactions that allegedly occurred are not claims "to assure receipt by the participant or beneficiary of the amounts provided or to be provided" by an insurance

contract or insurance annuity purchased after the termination of a pension plan. Similarly, section 502(a)(9) does not give former participants or beneficiaries standing to assert claims under sections 502(a)(2) or (3), the sections under which Plaintiffs originally brought the underlying action.

Standing is a question of subject matter jurisdiction (*Warth v. Seldin*, 422 U.S. 490, 498-500 (1975); *Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock*, 861 F.2d 1406, 1410 (9th Cir. 1988) (*citing Warth*)), and cannot be waived. *FW/PBS Inc. v. City of Dallas*, 493 U.S. 215, 230-231 (1990) ("federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines' " (citations omitted); *Shabazz v. Carroll*, 833 F.2d 149, 149 (9th Cir. 1987), *cert. denied*, 487, U.S. 1207 (1988) (jurisdictional issues raised in petition for rehearing); *Fiester v. Turner*, 738 F.2d 1474, 1475 (9th Cir. 1986) ("Jurisdiction over an appeal is open to challenge at any time."). Even after the addition of subsection (9) to section 502(a), neither this Court nor the District Court has subject matter jurisdiction over all of the claims raised and relief sought by plaintiffs. Hence, it is appropriate that this Court rehear this appeal to consider, as a matter of law, which claims can be brought and what relief can be sought by plaintiffs under ERISA § 502(a)(9). Applicants respectfully request that the panel grant this application so that these issues can be put before the Court in the Petition for Rehearing.

II. STATEMENT OF FACTS

On April 26, 1993, Plaintiffs filed their Third Amended Complaint for Declaratory and Injunctive Relief. In that Complaint, Plaintiffs sought declaratory judgment that Applicants were plan fiduciaries, that they had breached their fiduciary duties, and that they had engaged in prohibited transactions. They also sought orders compelling Maxxam to purchase new annuities and creating a constructive trust over any profits derived from the alleged ERISA violations. (Third Amended Complaint, Prayer, pp. 22-24). On May 17, 1993, the District Court determined that plaintiffs, as former participants or beneficiaries of the Plan, lacked standing to sue for any of their claims. The District Court affirmed its decision on July 17, 1993 (following Plaintiffs' motion for reconsideration), and Plaintiffs subsequently filed their appeal. (Op., pp. 3988-3999.)

On October 22, 1994, after all briefs and oral argument on appeal, Congress passed the Pension Annuitants Protection Act of 1994 ("PAPA"), which amended section 502(a) by adding subsection (9). (Op., pp. 3990-3991; Declaration of Kathleen V. Fisher, p. 7, ¶ 2 ("Fisher decl.").) Section 502(a)(9) provides in full as follows:

> (a) A Civil action may be brought . . .
>
> (9) in the event that the purchase of an insurance contract or insurance annuity in connection with the termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title or the terms of the plan, by the Secretary, by any individual who

> was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

On April 10, 1995 this panel filed its Opinion, without benefit of any briefing or argument by Applicants concerning the effect of section 502(a)(9) on the underlying action or the issues raised on appeal. (Fisher decl., p. 7, ¶ 2.) In section II.A of that Opinion, this panel concluded that Plaintiffs had standing to sue under section 502(a)(9) but did not discuss which of Plaintiff's claims could be brought under that new section. (Op., pp. 3989-3992.) Applicants filed a timely Petition for Rehearing, in which, given the short time presented to review the Opinion and file the Petition, Applicants, like the panel before them, failed to realize that the relief permitted under section 502(a)(9) was much more limited than that sought by Plaintiffs. (Fisher decl., pp. 7-8, ¶ 3.) On May 17, 1995, Applicants discovered the error made both by the panel and themselves, and determined to file this application as soon as practicable. (Fisher decl., p. 8, ¶ 4.)

III. NATURE OF THE ERROR

Section 502(a)(9) provides, in pertinent part, that:

> A Civil action may be brought . . . in the event that the purchase of an insurance contract or insurance annuity . . . constitutes a violation of part 4 [fiduciary duties] of this title or the terms

> of the plan . . . by any individual who was a participant or beneficiary at the time of the alleged violation . . . to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity. . . .

By its terms, section 502(a)(9) does not give rise to a cause of action unless an alleged breach occurs because the purchase of an annuity or insurance policy is a violation of fiduciary duties. Thus, because the use of residual assets as collateral for the bridge loan after termination of the plan was not a "purchase of an insurance contract or insurance annuity," it could not trigger section (a)(9). Similarly, section 502(a)(9) does not provide standing to former participants/beneficiaries to the extent they seek relief (in connection with the purchase of an insurance annuity that allegedly constituted a breach of fiduciary duty) other than that necessary "to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity. . . . "[1]

Here, Plaintiffs assert in the First, Second and Third Claims for Relief of the Third Amended Complaint that the purchase of the annuities upon the termination of the Plan was a violation of the Applicants' fiduciary duties. Thus, those claims state a cause of action under section (a)(9) as the panel interprets it: Plaintiffs have met the condition precedent – the purchase of an annuity or insurance policy – and they can sue to assure that each of them receives the amounts provided or to be provided by

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[1] In ERISA litigation, standing questions are controlled by the relief sought. *Murdock, supra,* 861 F.2d at 1410.

such annuities. But to the extent that Plaintiffs seek other remedies in connection with those claims, such as their requests for declaratory relief and the imposition of a constructive trust "for the benefit of the Plan's participants . . . over any profits . . . defendants improperly obtained through their breaches of fiduciary duty or prohibited transactions" (Third Amended Complaint, Prayer, ¶ "L," pp. 23-24), Plaintiffs lack standing to bring such claims and this Court lacks subject matter jurisdiction to hear them.

Plaintiffs also lack standing to bring their Fourth, Fifth and Sixth Claims for Relief. In those causes of action, Plaintiffs assert that Applicants breached their fiduciary duties by pledging alleged Plan assets as collateral for certain bridge loans and engaged in prohibited transactions by their use of the residual assets. However, since the use of residual assets for collateral and other purposes has nothing to do with the purchase of insurance annuities, those claims do not fall within the scope of section (a)(9) and Plaintiffs therefore have no standing to raise such claims or request relief for such alleged transactions. This lack of standing deprives the District Court and this Court of subject matter jurisdiction under ERISA over Plaintiffs' prohibited transaction claims. *See, e.g., Warth, supra,* 422 U.S. at 498-500; *Murdock, supra,* 861 F.2d at 1410. Thus, Applicants seek an amendment to their Petition for Rehearing so that the Court may rule, as a matter of law, which causes of action brought and relief sought by Plaintiffs trigger ERISA (or any other) subject matter jurisdiction.

IV. CONCLUSION

Because section 502(a)(9) only permits former participants or beneficiaries of a pension plan to bring an action under part 4 of ERISA where the purchase of an annuity or insurance policy allegedly constituted a breach of fiduciary duty, does not permit an action where an alleged breach of fiduciary duty arose out of other transactions, and only permits limited forms of relief, a rehearing regarding Plaintiffs' standing and the Court's jurisdiction is appropriate. Thus, defendants/appellees/cross-appellants, The Pacific Lumber Co., Maxxam Inc., Maxxam Group Inc., Charles Hurwitz, William Leone, Paul Schwartz and James Iaco, respectfully request that the panel grant this application for leave to file an amendment to their Petition for Rehearing, attached hereto as Exhibit "A."

DATED: May 19, 1995

Respectfully submitted,

MORRISON & FOERSTER

By /s/ Shirley M. Hufstedler
Shirley M. Hufstedler
Attorneys for Defendants/Appellees/Cross-Appellants The Pacific Lumber Co., Maxxam Inc., Maxxam Group Inc., Charles Hurwitz, William Leone, Paul Schwartz and James Iaco

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLARENCE KAYES, et al., Plaintiffs/Appellants/ Cross-Appellees, vs. PACIFIC LUMBER COMPANY, et al., Defendants/Appellees/ Cross-Appellants.	No. 93-16271, 93-16575 [Appeal from Judgment of the United States District Court for the Northern District of California, DC No. C-89-3500 (SBA)] **DECLARATION OF KATHLEEN V. FISHER IN SUPPORT OF APPLICATION TO FILE AMENDMENT TO PETITION FOR REHEARING**

I, Kathleen V. Fisher, state and declare as follows:

1. I am a member of the firm of Morrison & Foerster, counsel for defendants/appellees/cross-appellants ("Applicants") herein, and have been involved in the prosecution of this appeal and the Petition for Rehearing thereof. Based on that involvement with this matter, I have personal knowledge of the facts set forth below.

2. While the appeal was before the Ninth Circuit, but after the briefing and argument had been completed, Congress passed the Pension Annuitants Protection Act of 1994 ("PAPA"). In response to Plaintiffs' October 26,

1994 letter informing the Court about the passage of PAPA, on November 1, 1994, Applicants submitted correspondence to the Court wherein they offered to provide briefing on the effect of PAPA. The Court did not request or permit such briefing before it filed its April 10, 1995 Opinion.

3. On April 24, 1995, Applicants filed their Petition For Rehearing. Given the short time presented to review the Opinion and file the Petition, Counsel for Applicants failed to note the limited scope of relief afforded by ERISA section 502(a)(9), 29 U.S.C. section 1132(a)(9) and the effect on this Court's jurisdiction. Applicants therefore did not include the standing and jurisdiction issues relating to, section 502(a)(9) as a ground supporting their Petition for Rehearing.

4. On May 17, 1995, counsel for Applicants reviewed the Opinion of the Court and section 502(a)(9), and concluded that section (a)(9) did not provide Plaintiffs with standing to bring any claim other than one alleging that the purchase of an insurance annuity constituted a violation of fiduciary duties, or seek any relief other than that necessary to assure that the former plan participants or beneficiaries received the amounts provided or to be provided by such insurance annuity.

Executed under penalty of perjury at San Francisco, California, on this 19th day of May, 1995.

/s/ Kathleen V. Fisher
Kathleen V. Fisher

No. 93-16271, 93-16575

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLARENCE KAYES, et al.,

Plaintiffs/Appellants/Cross-Appellees,

vs.

PACIFIC LUMBER COMPANY, et al.,

Defendants/Appellees/Cross-Appellants.

Appeal from Judgment of the United States District Court for the Northern District of California
DC No. C-89-3500 (SBA)

PLAINTIFFS/APPELLANTS/CROSS-APPELLEES' OBJECTION TO DEFENDANTS/APPELLEES/ CROSS-APPELLANTS' APPLICATION TO AMEND PETITION FOR REHEARING

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PLAINTIFFS/APPELLANTS/CROSS-APPELLEES' OBJECTION TO DEFENDANTS/APPELLEES/ CROSS-APPELLANTS' APPLICATION TO AMEND PETITION FOR REHEARING

Plaintiffs/appellants/cross-appellees ("Plaintiffs") hereby object to Defendants' Application of May 19, 1995 to "amend" their Petition For Rehearing filed on April 24, 1995. In fact, Defendants' proposed self-styled "amendment" sets forth a new and untimely second petition for rehearing. Defendants state no compelling reason why the Court should accept their tardy second petition for rehearing. "Counsel should not request extensions of time [to file a petition for rehearing] *except for the most compelling of reasons.*" (Para. (1) Circuit Advisory Committee Note To Rules 35-1 to 35-3; emphasis added.) Absent any such showing, the Court should deny Defendants' Application.

In the alternative, Plaintiffs ask the Court to clarify its Order of May 24, 1995 directing Plaintiffs to file a response to Defendants' original petition for rehearing. This Order does not refer to Defendants' self-styled "amendment", and Plaintiffs do not know whether or not their response should address Defendants' *de facto* second petition for rehearing, which belatedly raises a new issue wholly unrelated to the issue posed in Defendants' original petition.

Fed.R.App.P. 40(a) limits the filing of a petition for rehearing to 14 days after the entry of the appellate court's judgment. Defendants' Petition For Rehearing, filed within that period, seeks rehearing of a single issue related to Part II E of the Panel's opinion. Defendants' Application – submitted 39 days after filing of the Panel's

opinion – seeks a rehearing on wholly separate and allegedly "recently discovered" issues related to Part II A of the Panel's opinion (concerning the jurisdictional and remedial scope of ERISA § 502(a)(9)).

Conspicuously absent from Defendants' Application is any "showing of diligence and substantial need", as required by Circuit Rule 31-2.2(b). Defendants' only explanation for their untimely Application is "the short time presented to review the Opinion and file the Petition", Application p. 4, Declaration of Kathleen V. Fisher ("Fisher Decl."), submitted with Defendants' Application, ¶ 3. Yet, "[a] conclusory statement as to the press of business does not constitute a showing of diligence and substantial need." Circuit Rule 31-2.2(b).

Congress added Section 502(a)(9) to ERISA on October 22, 1994. Counsel for Defendants had ample opportunity to consider the scope of that provision prior to May 17, 1995. See Fisher Decl. ¶ 4. Defendants incorrectly contend that the Panel filed its opinion "without benefit of any briefing or argument by Applicants concerning the effect of section 502(a)(9) on the underlying action or the issues raised on appeal". (Application p. 4, Fisher Decl. ¶ 2.) By letter dated October 26, 1994, counsel for Plaintiffs informed the Court of Congress' enactment of Section 502(a)(9) and its impact on this case. Ms. Fisher responded by letter to the Court dated November 1, 1994. The issue Defendants now belatedly raise in their *de facto* second petition for rehearing can only be described as inextricably linked to those discussed in Ms. Fisher's letter to the Court of November 1, 1994. Defendants' numerous attorneys – all experienced lawyers from major firms – must be assumed to have thought of, but rejected,

the argument they now assert in their *de facto* second petition.

If the Court does grant Defendants' Applicant To Amend, then Plaintiffs request an opportunity to submit additional briefing on the issues raised therein.

Date: May 26, 1995 Respectfully submitted,

SIGMAN, LEWIS & FEINBERG

By /s/ Peter W. Saltzman
Peter W. Saltzman

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLARENCE KAYES; GENE KENNEDY; SHARON KENNEDY; WILEY LACY; JOHN R. MAURER; LESTER REYNOLDS; SHIRLEY REYNOLDS; HOLLIS ROLLINS; DONALD FILBY; JACK MILLER; JAMES LOVELL; PAUL S. BRADY; WILFRED A. BLAIN; LLOYD S. TUCKER; DONALD J. SCHOENHOFER, Plaintiffs – Appellants, v. PACIFIC LUMBER COMPANY; MAXXAM GROUP, INC., MAXXAM, INC.; CHARLES HURWITZ; PAUL N. SCHWARTZ; JAMES IACO; WILLIAM LEONE, Defendants – Appellees.	No. 93-16271
UNITED STATES SECRETARY OF LABOR, amicus; AMERICAN ASSOCIATION OF RETIRED PERSONS (AARP), amicus, Amicus Curiae.	
CLARENCE KAYES; GENE KENNEDY; SHARON KENNEDY; WILEY LACY; JOHN R. MAURER;	No. 93-16575 DC# CV-89-03500-SBA

LESTER REYNOLDS; SHIRLEY REYNOLDS; HOLLIS ROLLINS; DONALD FILBY; JACK MILLER; JAMES LOVELL; PAUL S. BRADY; WILFRED A. BLAIN; LLOYD S. TUCKER,	)	Northern District of California
Plaintiffs – Appellees,	)	ORDER
v.	)	(Filed Jun. 7, 1995)
PACIFIC LUMBER COMPANY; MAXXAM GROUP, INC., MAXXAM, INC.; CHARLES HURWITZ; PAUL N. SCHWARTZ; JAMES IACO; WILLIAM LEONE,	)	
Defendants – Appellants.	)	
UNITED STATES SECRETARY OF LABOR, amicus,	)	
Amicus Curiae.	)	

Before: CHOY, POOLE and REINHARDT, Circuit Judges.

Defendants/Appellees/Cross-Appellants' Application to File Amendment to Petition for Rehearing is DENIED.

Plaintiffs/Appellants/Cross-Appellees shall file a response to the original Petition for Rehearing, as was previously directed by this court, within 14 days from the date this order is filed.